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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBON E. WAGENER,

Defendant and Appellant.

A153187

(San Francisco City & County
Super. Ct. No. 225976)

Defendant was arrested after he was found in the driver's seat of a stolen car, which had a folding bicycle inside the car on the back seat and two bicycles on a bike rack outside the car. After defendant was removed from the vehicle and handcuffed, an officer, without first reading defendant his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), asked him if he owned the bicycles. Defendant said he owned the bicycle on the back seat and wanted it brought with him to booking. He said he did not know anything about the two bicycles outside the car. Following a *Miranda* hearing, the trial court permitted the prosecutor to present the statements during his case-in-chief on charges of vehicle theft and receiving stolen property. The jury convicted defendant of attempted vehicle theft, a lesser included offense of vehicle theft, receiving a stolen vehicle, possession of burglary tools, and receiving stolen property. Defendant contends the trial court committed prejudicial error in allowing his statements about the bicycles to be introduced into evidence. Even assuming defendant's contention has merit, in view of the overwhelming evidence of his guilt, any error was harmless beyond a reasonable doubt. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The San Francisco District Attorney filed an information charging defendant with vehicle theft (Veh. Code, § 10851, subd. (a); count I), receiving a stolen motor vehicle (Pen. Code,¹ § 496d, subd. (a); count II), possession of burglary tools (§ 466; count III), and receiving stolen property (§ 496, subd. (a); count IV). It was alleged as to counts I and II that defendant had a prior auto theft conviction. (§ 666.5.) It was further alleged as to count IV that defendant had suffered a prior strike conviction (§§ 667, subds. (d), (e); 1170.12, subds. (b), (c)) and a prior state prison conviction (§ 667.5, subd. (b)).

A. The Prosecution Evidence

1. The Charged Offense—Theft of a Honda Civic

On May 26, 2016, A.G. parked his white Honda Civic in front of his San Francisco home. That evening at 8:30 p.m., as A.G. walked outside his house to go down to the laundry room, he observed his car where he left it. A few hours later, at “10:00, 10:30” p.m., however, he discovered his car was no longer parked in front of his residence. A.G. called the San Francisco Police Department to report the theft of his vehicle, and a police officer responded to his address at 4:20 a.m. the next morning, May 27. The Honda Civic had California front license plate No. 3RHL315. As will become relevant, A.G. did not have any bicycles inside or on the car when it was stolen.

On May 27, 2016, about 8:00 a.m., Y.W. parked her 1995 white, four-door Honda in San Francisco. The car had license plates, but Y.W. could only remember the last three numbers of the plates, 743. About 6:00 p.m. that evening, after Y.W. picked up her daughter from school and before she returned home, she noticed her front license plate was missing. When she returned to her residence, Y.W. realized the “proper” rear license plate was not on the back of her car. Instead, there was a different rear license plate. Y.W. had not given anyone, including defendant, permission to remove the license plates off her Honda and put those plates on any other vehicle.

¹ All statutory references are to the Penal Code unless otherwise indicated.

That same day at 4:30 p.m., San Francisco Police Officer John Cunnie noticed defendant sitting in the driver's seat of a parked 1995 white Honda. No one else was in the car. After running the front license plate of the vehicle, No. 3RHL315, Cunnie learned the Honda belonging to A.G. had been stolen on May 26.² At this point, he took defendant into custody. While examining the rear of the vehicle, Cunnie discovered the rear license plate did not match the front plate because it had a different number, 3NNT743. In the rear passenger seat, Cunnie discovered a companion plate with the identical number, 3NNT743, as the plate on the rear of A.G.'s Honda. Cunnie also found three bicycles—a folding bike in the back seat of the vehicle and two bicycles on the outside of the vehicle either on a bike rack or stuffed in the trunk.

As will be discussed in further detail below, during the investigation, Cunnie asked defendant whether he owned any of the bicycles. Defendant replied he owned the folding bicycle on the back seat but did not know anything about the other two bicycles.

In defendant's right front pants pocket, Cunnie retrieved a plastic box containing several pieces of white porcelain. After the court qualified Cunnie as an expert in auto theft, he testified the "chips" of porcelain are used "to break windows silently in order to gain access to a vehicle" in order to "steal from the vehicle or gain access to the vehicle to steal a vehicle itself."

Following defendant's arrest, Officer Brendan Caraway searched A.G.'s Honda's driver compartment where he found a silver key in the ignition attached to a key ring with five additional brass-colored keys. When Caraway pulled them from the ignition, he realized they were "jingle keys" or "skeleton keys." Cunnie opined the silver key "could be used as a burglary tool" because it could possibly be used to start the ignition of a vehicle for which it was not designed and was on a key ring with five other "worn down" keys similar in appearance.

² A.G. would later testify at trial he did not know defendant or give him permission to drive his car.

In the driver's seat, wedged between the lower cushion and the back rest, Caraway found a stack of credit cards and a driver's license, all in A.G.'s name, however, the last time A.G. saw the credit cards, they were in the right-side front passenger door compartment. Additionally, Caraway found A.G.'s Xbox One game system. Personal papers belonging to A.G. were discovered by another officer inside a messenger bag located on the Honda's front passenger-side floor. The messenger bag did not belong to A.G. and, generally, he kept his paperwork in the glove compartment and "in the doors."

A.G.'s Honda Civic was a salvaged title vehicle. When he last saw the car, it had a red temporary registration tag affixed to the back, left side window. When he retrieved his vehicle, the tag was missing. He also saw numerous items in his vehicle not belonging to him, including clothing and a couple of bags of hypodermic needles.

2. Uncharged Vehicle Thefts

The prosecution presented evidence of three uncharged prior vehicle thefts committed by defendant in San Francisco during the previous four years to establish intent, knowledge, and common plan regarding the present offense.

In the first incident, S.B. discovered her Volkswagen Jetta was missing from the front of her house in San Francisco on March 2, 2012. The front and back license plates affixed to the car were numbered 4LGP844. On March 4, San Francisco Police Officers Peralta and Gardner were dispatched to investigate a report of a suspicious vehicle with two occupants. Upon arriving, Peralta saw a parked silver Volkswagen Jetta. On the rear of the vehicle, in place of a license plate, Peralta saw a "paper dealer plate," one "typically issued by the dealerships until an individual's license plates come[] in the mail." While speaking with the individual who had reported the suspicious vehicle, the witness showed Peralta some cell phone photos he had taken depicting a male squatting next to the passenger door of the Jetta appearing to be in conversation with a woman in the front passenger seat.

As Peralta was standing on the street with the reporting witness, defendant and a woman, Crystal Trujillo, arrived. The witness identified both as the individuals who were acting suspiciously inside the vehicle. Defendant was arrested for being in

possession of the Jetta. In defendant's right front pants pocket, Peralta found a key. On the police report, however, Peralta checked off "key in the ignition."

The second incident occurred on September 1, 2012, when T.B.'s Toyota Tacoma pickup truck with California license plates went missing. On that same day, San Francisco Police Officer Gene Gabriel was in a police vehicle with two other officers when he encountered defendant driving a Toyota Tacoma pickup truck. Crystal Trujillo was the female passenger. Although there was no license plate on the front of the Tacoma, the rear had license plate No. 5H19755. Inside the camper shell of the truck were two mountain bikes. T.B. testified the rear license plate was not her plate because she did not recognize the numbers.

The third incident took place on May 2, 2015. M.W. was watching a silver Honda Element for his friend who was out of town. There was a Florida license plate on the rear of the vehicle. When he went to retrieve the vehicle from a parking lot during the afternoon, he discovered it was missing and notified the San Francisco Police Department. Later that evening, about 11:00 p.m., a San Francisco police officer spotted the stolen Honda Element parked in a different neighborhood. Defendant was in the driver's seat and a woman, later identified as Crystal Trujillo, was in the passenger seat. The vehicle had a California rear license plate, No. 6MED537, instead of a Florida plate as reported by M.W. There was no front license plate. Eventually the officer learned that the Honda Element was supposed to bear Florida license plate No. C7RB. Defendant was arrested for vehicle theft.

As to the Volkswagen Jetta, stolen in March 2012, the parties stipulated defendant pled guilty in April 2012 to felony vehicle theft in San Francisco Superior Court. It was further stipulated the distance from where A.G. parked his Honda to where it was eventually located was 1.7 miles.

B. The Defense Evidence

Nigel Phillips, an investigator with the San Francisco Public Defender's Office, testified he went to the location where A.G.'s Honda Civic was found to canvas the area in search of security cameras. He found cameras on the Honda dealership at 12th Street

opposite the Civic Center Hotel and also found three or four cameras on the hotel.

Phillips further testified he went to the Potrero Hill area with defense counsel where they met with the prosecutor and district attorney's investigator, Preston Lee, for the purpose of checking some keys, one silver and four gold,³ found in A.G.'s Honda's ignition. Lee tested the keys by using them to try to open the Honda Civic's doors or activate its ignition.⁴

Cynthia Hull, qualified by the trial court as an expert in fingerprint analysis and crime scene trace evidence, testified the top surface of the silver key found in the ignition was "ridged and ribbed"—on both sides. As a result, she might test it for DNA but not fingerprints.

Defendant did not testify.

C. The Jury Verdicts and Sentence

The jury acquitted defendant of vehicle theft but convicted him of the lesser offense of attempted vehicle theft in count I and convicted him on the remaining three counts as charged in the information. After a bench trial, the trial court found true the allegations pursuant to sections 666.5, 667, subdivisions (d) and (e), and 667.5, subdivision (b).

At sentencing, the trial court reduced the felonies to misdemeanors, and sentenced defendant to time served.

II. DISCUSSION

A. Defendant's Statements About the Bicycles

Defendant contends the trial court committed prejudicial error by allowing the prosecutor to introduce into evidence defendant's comments about the three bicycles in

³ As noted earlier, Officer Caraway testified he found a silver key attached to a key ring with five additional brass-colored keys.

⁴ Phillips did not state in his testimony whether the keys worked or not. The only reference we can locate in the record on that subject is a statement by the district attorney at the hearing on a motion in limine that the keys did not open the door locks or turn the key in the ignition.

violation of *Miranda*. He specifically maintains there was no administrative purpose to the officer's question regarding ownership of the bicycles.

Outside the presence of the jury, the court held an evidentiary hearing (Evid. Code, § 402) to determine if defendant's un-*Mirandized* statements about the Honda Civic and the bicycles were taken in violation of his Fifth and Sixth Amendment rights. Officer Cunnie testified he ordered defendant, the sole occupant, out of the Honda Civic after he was notified the vehicle had been stolen. He quickly handcuffed defendant. Believing he had probable cause to arrest defendant for vehicle theft and without reading defendant his *Miranda* rights, Cunnie asked defendant if he owned the vehicle. Defendant responded it belonged to A.G. Thereafter, when Cunnie observed one bicycle in the back seat and two on the rear of the Honda, another officer checked a database and determined the bicycles were not listed as stolen. Officer Cunnie then asked defendant if any of the bicycles belonged to him because he was trying to determine from where they came, the lawful owner, and whether they were stolen. Cunnie further explained if the property belonged to defendant, "it's booked with him, and it goes to the county jail with him." At trial, Cunnie testified that defendant said the folding bicycle on the back seat belonged to him but he did not know anything about the two other bicycles, and according to Cunnie, defendant was "pretty adamant about making sure that the folding bicycle came with him."

While the trial court excluded defendant's initial statement that A.G. owned the vehicle, it nonetheless permitted the prosecution to introduce defendant's statements regarding the bicycles because the officer testified they had not been reported stolen, and thus the questions about them were not reasonably likely to elicit incriminating responses.

B. Harmless Error Standard

Although we question whether the trial court should have allowed defendant's un-*Mirandized* statements, "We need not determine the constitutional issues raised by [defendant] . . . if any claimed error by the trial court in admitting [defendant's] statements was harmless beyond a reasonable doubt (*People v. Jenkins* (2000))

22 Cal.4th 900, 1015–1016 [finding it unnecessary to examine a ‘complex constitutional question’ because there was harmless error].) ‘Under that test, “we must determine on the basis of ‘our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury,’ [citation], whether [the hearsay was] sufficiently prejudicial to [defendant] as to require reversal.” [Citations.]’ (*People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) The admission of cumulative evidence, particularly evidence that is tangentially relevant to establishing a defendant’s guilt, has been found to be harmless error. (*People v. Jenkins, supra*, 22 Cal.4th at pp. 1015–1016.) Even when confessions are involved, ‘if the properly admitted evidence is overwhelming and the . . . extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless.’ ” (*People v. Houston* (2005) 130 Cal.App.4th 279, 295–296.)

C. There Was Overwhelming Evidence of Defendant’s Guilt

The record here demonstrates that regardless of defendant’s un-Mirandized statements with respect to ownership of the bicycles, there was overwhelming evidence defendant stole A.G.’s Honda Civic.

Crucial to this matter, the day after A.G.’s vehicle was stolen, defendant was found by Officer Cunnie sitting in the driver’s seat of the Honda. No one else was in the car. Cunnie discovered the vehicle was stolen after running the front license plate. Although the front plate (No. 3RHL315) belonged to the Honda, the rear license plate (No. 3NNT743) and an identical plate in the rear passenger seat were not a match to the Honda Civic. That evening following defendant’s arrest, in a different neighborhood of San Francisco, Y.W. discovered her front and rear license plates ending in 743 had been removed from her Honda at some point after she parked her car at 8:00 a.m. Moreover, defendant was in possession of burglary tools—porcelain chips in his right front pants pocket—that according to Cunnie, can be used to silently break a window to either steal a vehicle or take items from within. Additionally, an officer found a silver key in the ignition of A.G.’s Honda, attached to a key ring with four or five additional brass- or gold-colored keys, known as “jingle” or “skeleton” keys. Cunnie believed the silver key

could be used as a burglary tool to start the ignition of the vehicle for which it was not designed and described the five other keys as “worn down” keys similar in appearance. A.G. testified his personal papers and credits cards had been moved to a different area of his car, and he did not recognize a messenger bag found on the passenger-side floor. The last time he saw the credit cards, they were in the front right-side passenger door compartment, and he generally kept his personal papers in the glove compartment and “in the doors.” But when defendant was discovered in A.G.’s Honda, the paperwork was found in a messenger bag, and wedged between cushions of the driver’s seat were a stack of A.G.’s credit cards and his driver’s license.

Importantly, the prosecution presented evidence of defendant’s three prior vehicle theft arrests to show intent, knowledge, and common scheme and plan as there was a striking similarity between those arrests and the present matter. In each prior incident in which police officers found defendant seated in or squatting near the stolen vehicles, the license plates, as here, had been removed and replaced with different plates.

Defendant disputes admission of his un-*Mirandized* comments about the bicycle ownership was harmless beyond a reasonable doubt because other than defendant’s presence in the driver’s seat of A.G.’s Honda, there was little other evidence connecting him to the theft and, as a result, defendant’s responses to Cunnie’s question provided the “missing link.” The prosecutor, according to defendant, highlighted defendant’s statements by referring to them “multiple times to provide evidence of [defendant’s] culpable intent as he sat in the vehicle.”

We disagree, however, with defendant’s characterization of the prosecutor’s use of these statements during closing argument. Rather, the record reflects the prosecutor briefly referred to defendant’s statements about the bicycles during his 50-minute closing argument. In the middle of his argument, the prosecutor first noted there were two bicycles on the back of the vehicle and one on the back seat, and when Cunnie asked defendant about the bicycles, he replied the one in the back seat belonged to him. Then the prosecutor argued: “So the defendant claimed ownership of that item that was in the car in the back seat of the car.” Nothing more was said about this evidence until the end

of the prosecutor's closing argument. After reiterating defendant "put his own property in the vehicle," the folding bicycle, the prosecutor argued: "That was the statement, [t]hat bike's mine. That, I submit, is exercising control over something." Considering the other overwhelming evidence of defendant's guilt, including the three prior auto thefts admitted to show defendant's intent and common plan, and in view of the tangential relevance of defendant's comments, we conclude the prosecutor's brief reference to defendant's un-*Mirandized* statements did not contribute to the guilty verdicts. Thus, any error was harmless beyond a reasonable doubt.

III. DISPOSITION

The judgment is affirmed.

Margulies, Acting P. J.

We concur:

Banke, J.

Sanchez, J.

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People v. Wagener